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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES J. REAGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE COURT'S DECISIONS IN *NAPUE-GIGLO-AGURS* COMPEL THE FINDING OF A CONSTITUTIONALLY FLAWED TRIAL (FIFTH AMENDMENT-DUE PROCESS CLAUSE) UNDER CIRCUMSTANCES WHERE A CONVICTION RESULTED WITH THE AID OF FALSE EVIDENCE, WHERE THE PROSECUTOR KNEW THE EVIDENCE TO BE FALSE AND ALLOWED THE EVIDENCE TO GO UNCORRECTED?

(A). WHETHER UNDER THE ABOVE LINE OF AUTHORITIES IS IT MATERIAL WHETHER THE FALSE EVIDENCE OR TESTIMONY BEARS DIRECTLY ON AN ESSENTIAL ELEMENT OF THE GOVERNMENT'S PROOF OR DOES THE CONSTITUTIONAL FLAW YET REMAIN WHERE THE FALSE EVIDENCE BORE UPON THE CREDIBILITY OF THE KEY GOVERNMENT WITNESS?

(B). WHETHER THE LACK OF CERTAINTY AS TO THE APPLICABLE STANDARDS TO BE APPLIED IN FALSE TESTIMONY/UNCORRECTED FALSE EVIDENCE CASES CALLS INTO POWER THIS COURT'S SUPERVISORY ROLE WHERE THE SEVERAL CIRCUITS ARE NOT IN ACCORD AS REGARDING THE APPLICABLE STANDARDS TO APPLY IN SUCH SITUATIONS?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I.

JAMES J. REAGAN (hereafter petitioner), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his mail fraud convictions in the instant case.

II.

OPINION BELOW

The judgment of the Court of Appeals (App. 1, infra, 1-10) is unreported. The order of the Court of Appeals denying rehearing is, likewise, not reported (App. 2, infra). The opinion of the District Court is not reported.

III.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 16, 1982. A timely petition for rehearing with suggestions that the case was appropriate for *in banc* review was timely filed, but denied on September 27, 1982. This court's jurisdiction is invoked under 28 U. S. C. § 1254(1); this Petition for Certiorari is filed within the period of time set forth under Supreme Court Rule 20.1.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES

Pursuant to Supreme Court Rule 21.1(f) the following constitutional provisions and statutes are set forth in the Appendix:

U. S. Constitution, 5th and 6th Amendments (Appendix 3, *infra*)
18 U. S. C. §§ 1341, 1342 (Appendix 4, *infra*)
Rule 33, Fed. Rules Crim. Procd. (Appendix 7, *infra*).

V.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois (Chicago) Petitioner was convicted of violating the federal mail fraud statutes in violation of 18 U. S. C. §§ 1341, 1342. Petitioner was sentenced to a term of two (2) years in custody on each of the several counts submitted to the jury, the sentences to run concurrent.

On appeal, a panel of the Seventh Circuit affirmed petitioner's mail fraud convictions agreeing that there was evidence of government misconduct in the knowing suppression of material evidence but, finally, that the cumulative impact of the error(s) was . . . seemingly harmless error.

1. On October 23, 1980, Petitioner, an attorney, was indicted and charged with aiding and abetting Richard D. Link in a scheme to defraud Link's employer, the Union Oil Company of California, of substantial profits from the sale of real estate which Link was entrusted to sell on behalf of Union Oil. The following facts are not in dispute.

Between 1967 and 1977, Link was employed as a real estate representative for Union Oil and was responsible for selling certain obsolete service stations owned by Union Oil. Link had authority to obtain appraisals, recommend selling prices, advertise the properties, negotiate with prospective buyers, and handle closings. All purchase agreements were subject to approval by Union Oil.

In 1967, Link sought to retain petitioner in connection with an unrelated property transaction. At that time, Link told Petitioner that because of his position with Union Oil he could purchase Union Oil properties and resell them at a personal profit and asked defendant whether he knew of any way to accomplish this type of transaction.

The fraud at issue was perpetrated through the use of land trusts, which conceal the identity of the beneficiary from everyone but the bank's trust department, and fictitious nominees, who would purchase various parcels of real estate from Union Oil and then "turn around" and sell to a third party at a substantial profit to Link. This was done without Union Oil's knowledge. The proceeds of the second sale were then delivered to Link who would pay Petitioner in cash for his Attorney's fees.

Upon Link's request Petitioner allegedly supplied the fictitious nominees for the deals. Petitioner and Link would then cause the fictitious nominee to offer to purchase the property and give Union Oil a $400 or $1,000 cashier's check as earnest money. The earnest money receipt set forth the basic terms and conditions of the sale. Petitioner or his associate

personally represented the fictitious nominees at the closing of the turn around sale.

However, the signatures of the fictitious nominees or their representatives which appeared on the real estate deeds and closing statements were not genuine. Either Petitioner or one of his secretaries, acting at his direction, notarized the fictitious signatures.

Petitioner represented Link in several real estate transactions, but the nature and extent of Petitioner's participation in the fraud scheme was disputed. Link testified that Petitioner provided the nominees and arranged for land trusts on his own initiative. Petitioner testified that he provided nominees only upon Link's request and established land trusts pursuant to Link's specific directions. According to Petitioner, he believed that Union Oil knowingly permitted Link to make a personal profit from the transactions and that he was "just closing real estate transactions" for a client. Link was the *government's principal witness* in establishing Petitioner's knowledge and intent.

2. Link was indicted in the U. S. District Court, Chicago, Illinois, in March, 1979 (79 CR 209). His indictment charged that he violated 18 U. S. C. § 1341 in that, essentially, he cheated UNION OIL COMPANY out of money in connection with real estate transactions.[1] Link entered a guilty plea to the indictment pursuant to a plea agreement and he was sentenced to nine (9) months in custody; same to commence on June 11, 1979. On September 10, 1979 Link, through counsel, successfully obtained a substantial modification, absent government opposition (App. 5, *infra*).

Following Link's release from custody, Petitioner was indicted.

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[1] Petitioner does not reproduce Link's indictment within this Petition for Certiorari. In the event review is granted then Link's indictment and all pertinent docket entries will be included in the joint Appendix.

3. Petitioner stood trial before a jury on the multiple count mail fraud indictment, 80 CR 658. Pretrial Petitioner made the following pretrial requests:

> **"11. All information of whatever form, source or nature which tends to exculpate the defendant either through an indication of his innocence or through the potential impeachment of any Government witnesses, and all information which may be or become or benefit to the defendant preparing for or presenting the merits of his defense at trial. The request includes all facts and information of whatever form, source or nature, which the United States Attorney, the Federal Bureau of Investigation, or any of their agents has or knows about which is or may be calculated to become of benefit to the defendant either on the merits of the case or on the question of credibility of witnesses."[2]**

4. During Petitioner's trial, Link, as a government witness, told the jury he had been sentenced to nine (9) months in custody . . . but Link declined to tell the court or jury that upon his motion, unopposed by the government, that he was released after spending less than ninety (90) days in custody.[3] During closing argument government counsel reminded the jury that Link was a credible government witness and . . . he was in jail for a period of nine (9) months . . . and was therefore a believable witness.

Additionally, during the government's closing argument the following comment is found in the record:

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[2] Original record at R. 8. The government, pretrial, agreed to supply the information contained in Petitioner's pretrial request No. 11 (original record at R. 10).

[3] Government counsel during Petitioner's trial was the same U.S. Attorney appearing on behalf of the government during Link's prosecution and that assistant U.S. Attorney conferred with Link's counsel regarding the request for sentence modification. As already stated, the government did not oppose the sentence modification and trial counsel for the government in Petitioner's case had direct knowledge of the September 10, 1979 sentence modification order (See, App. 6, *infra*).

> Now, when you think of Link's reasons for telling the truth, contrast them with [defendant's] motives to white wash his involvement, to testify that Link lied. He has got every reason in the world. He told the psychologist, "My biggest fear is going to jail." So, when he testified here, he would testify that Link lied . . . *He'll say anything he can not to go to jail for two or three months.* (Emphasis added).

It is the petitioner's theory that the attorney for the government offering this most impermissible comment to the jury was, *sub silentio,* telling everyone within earshot that Link only spent 2 or 3 months in jail and thus petitioner, in the event he was convicted, would suffer no worse a penalty.

5. On May 26, 1981, petitioner had post-trial motions denied and he was sentenced to a term of two (2) years in custody.

6. On September 25, 1981, petitioner filed, per Rule 33,[4] Fed. R. Crim. Proc., a motion for new trial based upon the petitioner learning post-trial, that Link had successfully moved for sentence modification, absent opposition from the government, . . . and contrary to petitioner's specific pre-trial request, the information surrounding the successful motion for sentence modification was suppressed by the government. On October 29, 1981, the motion for new trial was denied and the appeals were consolidated in the Seventh Circuit.[5] This petition follows the affirmation of the conviction below.

VI.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions under the Due Process Clause of the Fifth Amendment concerning the circum-

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[4] Rule 33 is reproduced as Appendix 7, *infra.*

[5] The district court order denying the Rule 33 post trial motion was not the subject of publication and is not reproduced within this petition.

stances under which a new trial must be granted where material evidence has been the subject of suppression. The Circuits are not in accord as to the appropriate *standard* applicable on review of jury verdicts where the pertinent question to be reviewed involves the suppression of material information where pretrial requests for such suppressed information was made. This case presents an appropriate vehicle for the resolution of the re-occurring question as to the applicable standard to be applied by a court of review to cases involving government misconduct.

2. This petition involves a jury trial where the primary government witness received a substantial post-sentence consideration most probably because the government declined to oppose the relief sought (sentence modification reducing the time in custody from nine (9) months to less than three (3) months). The sentence modification occurred in the same district court (but before a different judge) wherein petitioner stood trial and the same assistant U.S. Attorney represented the government in both prosecutions. The petitioner was not indicted until several months after the witness (Link) received the sentence modification.[6]

3. The Court has tended to take a uniform approach to cases involving the knowing use of false evidence or allowing false evidence to go uncorrected [to a jury, during trial]. In both *Napue* v. *Illinois*[7] and *U.S.* v. *Agurs*,[8] the Court utilized a standard . . . if [in] any reasonable likelihood [the] judgment of the jury could have been affected, a new trial must be granted. The lesson of *Napue* was repeated in *Giglio* v. *U.S.*[9] In *Giglio* the Court granted relief where the government failed to

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[6] Link received his sentence modification on September 10, 1979 (App. 5, *infra*) and petitioner was indicted in March, 1980.

[7] *Napue* v. *Illinois*, 360 U. S. 264, 79 S. Ct. 1173 (1959).

[8] *U. S.* v. *Agurs*, 427 U. S. 97, 96 S. Ct. 2392 (1976).

[9] *Giglio* v. *U. S.*, 405 U. S. 150, 92 S. Ct. 763 (1972). (opinion by Chief Justice Burger).

make available, during a jury trial, evidence affecting the credibility of the main government witness in that case. In *Giglio* the Court stated:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra,* at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combining of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra,* at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "*the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .*" *Napue, supra,* at 271, 79 S.Ct., at 1178.

(92 S. Ct. at 766)

4. In *Agurs* the Court refined the *BRADY* Rule by defining three levels of materiality that, depending upon the circumstances, a defendant must show to obtain reversal for nondisclosure. In the first situation, when a prosecutor knows or should know that the government's case contains perjured

testimony, reversal is required if there is "any reasonable likelihood' that the false testimony could have affected the judgment of the jury. A similar standard applies in the second situation, when the prosecution fails to disclose evidence specifically requested by the defendant. Under these circumstances, reversal is required if nondisclosure "might have affected the outcome of the trial." In the third situation, when only a general request or no request is made, a more stringent standard of materiality applies. Reversal is required only if the undisclosed evidence "creates a reasonable doubt that did not otherwise exist." Thus, in *Agurs* the Supreme Court recognized that some evidence is so clearly exculpatory that fairness requires its disclosure even if no request is made.[10]

Under the above analysis the . . . any reasonable likelihood . . . standard applies to the situation in petitioner's jury trial. Here the prosecutor knew, or should have known, that the government case involved false material testimony. Indeed, the same U.S. Attorney prosecuting Link prosecuted the petitioner and as Appendix 6, *infra*, discloses that prosecutor absolutely received notice that Link's sentence had been materially altered absent government opposition. Under such circumstances the Court of Appeals for the Seventh Circuit in the instant case offered an erroneous analysis while affirming petitioner's conviction, See App. 1-5, 6, infra. Other Circuits have supplied the correct standard under similar circumstances.[11]

5. In *U. S.* v. *Barham*, 595 F. 2d 231, (CA 5, 1979), the Court, reversed a counterfeiting conviction while reviewing the correct *standard* to be applied when a reviewing court is

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[10] The petitioner is *not* asserting that he had a constitutional right to discovery cf., *Weatherford* v. *Bursey*, 429 U. S. 545, 97 S. Ct. 837 at 846 (1977). This petition does not address the possibility of a constitutional approach to discovery in federal criminal cases.

[11] *U.S.* v. *Sutton*, 542 F2d 1241 (CA 4, 1976); *U.S.* v. *Barham*, 595 F2d 231 (CA 5, 1979); *U.S.* v. *Iverson*, 637 F2d 799, 803 (D. C. Cir., 1981); *U.S.* v. *Bigeleisen*, 625 F2d 203, 208 (CA 8, 1980).

presented with circumstances similar to those herein presented. In *Barham* the prosecution witnesses offered the jury the government's version of events while the defendant and his witnesses offered a non-culpable version of the same events. The government witnesses, on cross examination, by *Barham's* counsel, declined to fully *own up* to the various benefits received by these witnesses from the government; and government trial counsel made no effort to correct any of the misstatements offered by the government witnesses. The suppressed evidence related only to the credibility of the government's witnesses. While reversing, the *Barham* Court offered the following correct analysis:

> "We elaborated upon this standard in *United States v. Anderson,* 5 Cir., 1978, 574 F.2d 1347: "The reviewing court must focus on the impact on the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury." *Id.* at 1356. As we explained in *Anderson,* this "reasonable likelihood" standard of materiality is a "low threshold" standard. *Id.* at 1355. It is a brother, if not a twin, of the standard ("harmless beyond a reasonable doubt") for determining whether constitutional error can be held harmless. *See Chapman v. California,* 1967, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705. A strict standard is appropriate because, as the Supreme Court has explained, false testimony cases involve not only "prosecutorial misconduct," but also "a corruption of the truth-seeking function of the trial process," United States *v. Agurs, supra,* 427 U.S. at 104, 96 S.Ct. at 2397."
>
> (595 F. 2d at 242, emphasis ours).

Another decision demonstrated the appropriate standard for review is *U. S.* v. *Sutton,* 542 F. 2d 1239 (CA 4, 1976). In *Sutton,* post trial, it developed that the key government witness had received certain post arrest threats as an inducement to testify against Sutton and others. During closing argument, government counsel urged the credibility of their "key" witness by telling the jury "no one threatened Cannon" (543 F. 2d at

1241). Post trial, it developed that the F.B.I., after Cannon's arrest, had indeed threatened Cannon. After the district court denied post trial relief, the Court of Appeals reversed distinguishing as between VERACITY (or perjury) CASES and "discovery" cases (id. at 1241). As regarding VERACITY CASES the *Sutton* Court found that the opinion by the Chief Justice in *Giglio* provided the appropriate standard . . . and that standard in a VERACITY situation was said to be "WHETHER THERE IS ANY REASONABLE LIKELIHOOD THAT DISCLOSURE WOULD HAVE AFFECTED THE JUDGMENT OF THE JURY" (*Sutton* 542 F. 2d at 1242, citing *Giglio* 405 U. S. at 154, 92 S. Ct. at 763).

The *Sutton* Court continued analyzing the different standards as follows:

> "*Agurs*, on the other hand, may be viewed as a "discovery" case. Neither a threat to prosecute nor a promise of leniency was involved. Instead, there was the rather typical contention that the government possessed information unknown to the defendant which it should have produced, *i.e.*, evidence of a prior criminal record and violent disposition of the deceased. In an opinion by Mr. Justice Stevens, the Court concluded that, since in *Agurs* there was no prosecutorial misconduct and no reason to question the veracity of any of the prosecution witnesses, the test of any reasonable likelihood that the jury verdict could have been affected was not applicable. *Agurs, supra*, at ____, 96 S. Ct. 2392. The Court thereupon held that in the ordinary "discovery" type of case the standard of materiality that justifies granting a new trial is more difficult to meet, and that the petitioner can satisfy it only by showing that the omitted evidence would have created a reasonable doubt that did not otherwise exist. *We believe that the Agurs standard is inapplicable in the Giglio-type situation with which we are confronted in the present case, i.e., where a false statement intended to shore up the credibility of a witness has been made at trial.*"

(542 F. 2d at 1242, emphasis ours).

Thus the Fourth Circuit in *Sutton* distinguishes as between VERACITY and DISCOVERY decisions. Veracity cases involve either prosecutorial misconduct or a corruption of the truth-finding process. In a veracity case where the reliability of a [key or material government] witness may be determinative of guilt or innocence, [then] nondisclosure of evidence that affects credibility is a denial of FUNDAMENTAL FAIRNESS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT (citing *Giglio*, 405 U. S. at 154).

Thus, the Fourth Circuit correctly analyzed the necessity for the granting of a new trial where the suppressed evidence ran to the *veracity* of the key or material government witness. Similarly, the Fifth Circuit in *U. S.* v. *Barham, ante*, likewise correctly analyzed the VERACITY vs. DISCOVERY approach in attempting to ascertain constitutional deprivation *vel non*. The Fifth Circuit in *Barham* joined the Fourth Circuit in *Sutton* while finding that the VERACITY situations call into play the Due Process Clause of the Fifth Amendment thus necessitating the granting of a new trial (and in each case a new trial was granted notwithstanding the suggested sufficiency of the evidence to convict).[12]

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[12] In both *Sutton* and *Barham*, the Appellate Court(s) makes pointed reference to the government's closing arguments in each case. (*Sutton* 542 F. 2d at 1241; *Barham*, 595 F. 2d at 243, 244, n. n. 17, 18).

In the context of the case presented in this petition, the government urged the credibility of the "key" government witness, Link, by telling the jury, during closing argument, that Link was in jail for a 9 month period (Tr. 741) and that the petitioner would lie to the trial jury to stay out of jail for 2 or 3 months (Tr. 805).

Thus, the government urged the credibility of their only KNOWLEDGE AND INTENT WITNESS by misrepresenting not only the period of time Link was in custody, but, equally important, that the government refused to oppose the early release of Link ... after 89 days in custody, not 9 months. Clearly the instant case falls within the VERACITY line of decisions, not the DISCOVERY decisions.

The Court of Appeals for the Eighth Circuit, in *U. S.* v. *Bigeleisen* 625 F. 2d 203 (CA 8, 1980) came to a similar decision while analyzing suppressed information relative to the credibility of government witnesses during a drug-jury trial. The facts of the case simply turn on whether the government declined to correct the false testimony of one of their key witnesses in such a way that a mistaken impression as to benefits flowed to the trial jury. Also, government counsel not only failed to correct the false impressions . . . but also argued the credibility of the false information . . . to the jury. Under those circumstances, the Court granted a new trial relying on the *Napue-Giglio-Agurs* trilogy (625 F. 2d 206-208). The veracity aspect of the case is incorrectly analyzed notwithstanding the granting of a new trial.[13]

6. As explained, by the Fifth Circuit in *Barham* the appropriate standard "any reasonable likelihood", is a brother or the . . . harmless beyond a reasonable doubt standard . . . for determining whether constitutional error can be held harmless (595 F. 2d at 242; citing to the Court's opinion in *U. S.* v. *Agurs* . . . 595 F. 2d at 242).

While the Fourth Circuit in *Sutton* reverses the bank robbery conviction based on both *Agurs* and *Giglio* . . . that Court of Appeals joins in the lack of certainty by finding the expression "we think" as the predicate to the reversal in that case (542 F. 2d at 1241).

The Eighth Circuit in *Bigeleisen, ante,* likewise reverses primarily on the Fifth Amendment constitutional predicate but, once again, that Court fails to correctly analyze or interpret the standards to be applied in connection with not only con-

[13] In *Bigeleisen* the Court reviews *Napue* and *Giglio,* as well as the Fifth Circuit case, *U.S.* v. *Sanfilippo,* 564 F. 2d 176 (CA 5, 1977) . . . but then while attempting to weave *Agurs* into the Appellate decision the *Biegeleisen* court fails to articulate the differences as between VERACITY problems and DISCOVERY problems (625 F. 2d at 208). The *Biegeleisen* Court substitutes the question of MATERIALITY . . . in place veracity v. discovery (id. at 208).

stitutional error, but, the differences and standards to be applied in *veracity* v. *discovery* situations.

It is clear that in each instance, the government prosecutor is at fault. However, it also appears that the constitutional implications are only invoked when the prosecutor fails or refuses to clarify and articulate various bargains or deals with key and material government witnesses. Unanswered questions include who amongst us are [is] truly capable of determining the key or material government witness or witnesses. Reduced to a guessing situation, the government would always urge that the particular witness or witnesses were neither key nor material in light of "other" evidence presented to any particular trial jury. All of this truly baits the question . . . for the real question is why must we face the dilemma at all? Is it not the responsibility of the government prosecutor to be aware of the benefits and bargains flowing to their own witnesses? Are we to assume that government agents lie to government attorneys . . . in connection with what the agents themselves may have promised different witnesses?

The uncertainty clearly does nothing more than represent the struggle within the Courts to ascertain and delineate circumstances within which to apply the *Napue-Giglio-Agurs* trilogy.

The lack of certainty is clearly expressed in the instant case where the Court below declined to find that the suppression of information relating to the credibility of the government's "key" witness reached the level of constitutional deprivation. It is discouraging to note that the Court of Appeals simply declined to follow the trilogy of cases . . (*Napue, Giglio,* and *Agurs*) demonstrating the clear call of constitutional deprivation where the prosecution knowingly [or should have known] suppresses material information reflecting upon the credibility of the "key" prosecution witness. The decision below is tantamount to simple desire [by the Court below] to ignore the decisions reflecting on the same subject matter from this Court.

This cannot be countenanced. In the instant case as regarding the actual allegations of mail fraud there was only a single government witness who could and did provide testimony as to both knowledge and intent. That witness was Richard Link. The petitioner offered contrary testimony, asserting, to the trial jury, both a lack of knowledge and/or criminal intent in connection with the multiple real estate closings which provided the *sine qua non* of the multiple count mail fraud indictment. It is not enough for the government to suggest that a reading of the transcript demonstrated that petitioner was able to paint Link as a "bad-guy". More to the point, is the simple and unmistakable fact that the government, for their own purposes, declined to make available clear and unmistakable evidence of a substantial sentence modification ... a modification which occurred prior to the petitioner's indictment. Indeed, had the evidence not been suppressed by the government, the petitioner would have been in a position to argue that the indictment against him was returned ... as a result and a reward for Link's sentence modification.[14] It is not as though the government

[14] In *U. S.* v. *Butler*, 567 F. 2d 885 (CA 9, 1978), the Court reviewed the denial of a rule 33 motion after affirming drug convictions against Butler and others on direct appeal (472 F. 2d 1 (CA 9, 1973). The gist of the proceedings involved the failure of the government during the original jury trial to correct the false impression as to lack of leniency to the material government witness in that case, Durden. The Court, while granting a new trial, relied upon the *Napue-Brady-Giglio* trilogy finding that had the "real" bargains flowing to the government witness not been either suppressed or gone uncorrected then the defense could have cast greater doubt on the prosecution's case and increased the scope of the closing defense arguments and that certainly would have affected the weight given his [Durden's] testimony by the Jury.

The *Butler* analysis is certainly applicable to our situation in that the petitioner certainly could have argued the suppressed benefits flowing to Link in an effort to cast doubt on his testimony both during Link's cross examination and during petitioner's closing argument.

(This footnote continued on following page.)

opposed or took issue with Link's request for sentence modification. Quite to the contrary, the government's "silence" may well have been the equivalent of joining in Link's motion for sentence modification.

7. Notwithstanding all of the above, the Appellate Court in the instant case declined to find that either the suppressed evidence or the uncorrected false testimony reached constitutional dimension, ... notwithstanding the teachings of *BRADY-NAPUE-GIGLIO-AGURS* (App. 1-6, 7 *infra*). Simply the Court of Appeals declined to follow the *standards* applicable to such situations (e.g., once the constitutional deprivation appears, then the error must be deemed harmless beyond a reasonable doubt; if not, a new trial must be granted). It is almost as if the Court of Appeals paid only lip-service to the existence of these constitutional precedents. Surely the Due Process Clause of the Fifth Amendment cannot be interpreted as benignly as did the Court below ... and thereafter receive the stamp of approval from this Court.

It cannot be doubted that as between the Fourth, Fifth, Eighth and Ninth Circuits ... no one of those Courts uniformly analyze or apply the standards attempted to be articulated by

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(This footnote continued from previous page.)

The petitioner at bar urges the Court to note that both *Napue* and *Giglio* involved post trial/post conviction proceedings wherein the suppressed information was first brought to the attention of the trial court, post trial (*Napue* 79 S. Ct. at 1175-1176; *Giglio*, 92 S. Ct. at 765). The same holds true for *Butler, ante*, and the instant case. It is clear from the many similar decisions that the trial courts are consistently reluctant to grant post conviction relief notwithstanding the presentation of the constitutional issue. It seems that most trial courts have a tendency to reduce the presentation of such evidence to inconsequential, unimportant, and/or harmless error. The apparent reluctance of trial court's to grant relief, post conviction, may well be based on a lack of clarity as to the appropriate standards applicable upon the presentation of the constitutional issue (e.g., veracity v. discovery).

the Court in *Agurs*. Perhaps the proper analysis is found in the veracity v. discovery analysis in *U.S.* v. *Sutton, ante.* In any event, we have attempted to demonstrate the lack of uniformity within the circuits on an important and reoccurring Fifth Amendment question (e.g., the correct constitutional approach to situations where the government either suppresses or allows to go uncorrected false evidence or testimony involving a key or material witness . . . when either the testimony or evidence may have affected the judgment of the jury, (see *U.S.* v. *Butler*, 567 F. 2d 885 at 888-891).

It is unrealistic to believe that there cannot be a constitutional question under the Due Process Clause of the Fifth Amendment where a government prosecutor (1). suppresses information relative to the benefits flowing to a key government witness, and (2). allows to go uncorrected false testimony regarding those benefits. Nevertheless, that is the situation displayed within the contours of this petition.

VII.

CONCLUSION

The petitioner, JAMES J. REAGAN, respectfully requests that this Court grant his Petition For Certiorari. The petitioner has presented an important and reoccurring question involving a constitutional claim which has been the subject of several decisions by the Court. Notwithstanding the Court's decisions, the Circuits are hardly in accord as to an appropriate interpretation and analysis of the constitutional approach to the suppression-uncorrected testimony situations.

Under such circumstances, the granting of certiorari is appropriate.

Respectfully submitted,

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